



FAIR POLITICAL PRACTICES COMMISSION

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February 13, 2012

Felix Bachofner  
Mayor, City of Seaside  
P.O. Box 1222  
Seaside, CA 93955-1222

Re: Your Request for Informal Assistance  
**Our file No. I-12-014**

Dear Mr. Bachofner:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.<sup>2</sup>

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply such as Government Code Section 1090 or common law conflict of interest.

**QUESTION**

Do the Act's conflict-of-interest provisions prohibit you from making, participating in making, or influencing decisions regarding the West Broadway Urban Village Plan, including a streetscape improvement project, and decisions specific to a proposed library considering that you have an interest in a residential rental property within the plan area and immediately across from the proposed library?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

## CONCLUSION

Your economic interest in your rental property appears to be directly involved in decisions regarding the West Broadway Urban Village Plan and any specific decisions regarding the proposed library. The financial effect of the decisions on this economic interest is presumed to be material. Accordingly, you may not make, participate in making, or use your official position to influence the making of these decisions unless you can (1) rebut the presumption of materiality by showing that it is not reasonably foreseeable the decisions will have *any* financial effect on your rental property and (2) determine that there will be *no* reasonably foreseeable material financial effect on any other economic interest you may have including, but not limited to, your economic interests in your rental business and tenants of your rental business.

## FACTS

You are the Mayor of the City of Seaside (the "City") and also serve as the Chair of the City's Redevelopment Agency. You also own property within the City located along Broadway Avenue. In a telephone conversation on January 19, 2012, you indicated that this property was a residential rental unit in a largely commercial neighborhood.

The City has proposed a new library immediately across from your property. In addition, you expect the City to consider various proposals in the future relating to Broadway Avenue as well as the entire West Broadway Urban Village Plan (the "WBUV"), a development project encompassing Broadway Avenue. In the near future, you are anticipating a streetscape improvement project consisting of street narrowing, tree planting, and sidewalk widening.

## ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

**Steps One and Two: Are you a public official who would be making, participating in making, or using your official position to influence a governmental decision?**

As the Mayor of the City, you are a "public official" within the meaning of the Act.<sup>3</sup> (See Section 82048.) In addition, you would be making, participating in making, or influencing

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<sup>3</sup> If a public official's office is listed in Section 87200, which specifically includes mayors and city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of

a governmental decision when taking part in any decision by the Seaside City Council or the Seaside Redevelopment Agency regarding the WBUV and the proposed library.<sup>4</sup>

### Step Three: What are your economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Of the economic interests recognized under the Act<sup>5</sup>, those interests that may be implicated by your account of the facts are the following:

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the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

<sup>4</sup> A public official “makes a governmental decision” when the official, acting within the authority of his or her position, votes on a matter, obligates or commits his or her agency to a course of action, or enters into a contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Section 87100; Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision before his or her own agency if, for the purpose of influencing the decision, the official contacts or appears before a member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3.)

Residential Rental Property: From all indications, your interest in the property located on Broadway Avenue is valued at \$2,000 or more. Accordingly, you have an economic interest in this property. (Section 87103(b).)

Rental Business: You have stated that your property on Broadway Avenue is rented out for residential purposes. Provided that you have an investment of \$2,000 or more in this business and will receive income of \$500 or more from this business in the 12 months prior to a decision, you also have economic interests in your rental business as both a business entity and a source of income. (Section 87103 (a), (c), and (d).)

Tenants of your Rental Property: To the extent that you receive income from any particular tenant of your residential rental property in the 12 months prior to a decision, you also have an economic interest in the tenant as a source of income. (Section 87103(c).)<sup>6</sup>

Personal Finances: A public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.)<sup>7</sup>

**Step Four: Are your economic interests directly or indirectly involved in the decision?**

Residential Rental Property:

In pertinent part, Regulation 18704.2(a) states that real property in which a public official has an economic interest is *directly* involved in a governmental decision if:

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<sup>5</sup> Our analysis is limited to the economic interests you have identified.

<sup>6</sup> You have not identified any tenant of your rental property. Accordingly, we cannot analyze any potential conflict of interest you may have in a decision affecting the tenant. However, in light of our conclusion that your economic interest in real property disqualifies you from taking part in decisions regarding the WBUV and decisions specific to the proposed library, it is unnecessary for us to consider economic interests in your tenants at this time. If you have additional questions related to an economic interest in any particular tenant, it is advisable that they seek further assistance providing all relevant facts.

<sup>7</sup> A financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal finances and would not be analyzed separately under the "personal financial effects" rule. (Regulation 18705.5(a).) Based upon the facts provided, there is no indication that the personal financial effects rule applies to the facts you have provided and we will not discuss it further.

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision.

[9] ... [9]

“(6) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.”

From the facts you have provided, your property is located within the WBUV. In addition, a streetscape improvement project would specifically involve improvements to Broadway Avenue that would appear to result in new or improved services for your property. Accordingly, your economic interest in your rental property is *directly* involved in decisions regarding the WBUV including any improvements to Broadway Avenue under Regulation 18704.2(a)(1) and (a)(6). Moreover, your economic interest in your real property also appears to be *directly* involved in any decisions specific to the proposed library as it appears that your property is within 500 feet of the proposed location.

Rental Business:

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official’s agency when that business entity or source of income, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Business entities and sources of income that are not directly involved in governmental decisions are regarded as indirectly involved. (Regulations 18704.1(b), 18705.1(a)(2), and Regulation 18705.3(b).) From the facts provided, there is no indication that your rental business initiated the proceedings or is a party in, or subject of, the proceedings within the meaning of Regulation 18704.1. Accordingly, it appears as though your economic interests in your rental business, as both a business entity and a source of income, are *indirectly* involved in any decisions regarding the WBUV, including any improvements to Broadway Avenue, and any decisions specific to the proposed library.

**Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?**

**Materiality**

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Residential Rental Property:

Any financial effect of a governmental decision on real property *directly* involved in the governmental decision is presumed to be material. (Regulation 18705.2(a)(1).) This presumption may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (*Ibid.*) However, the size of the financial effect does not matter. If there is *any* financial effect at all, even "one-penny," that effect is presumed to be "material."

Rental Business:

For economic interests in business entities *indirectly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on a business, not publicly traded and relatively modest in economic size, is material if it is reasonably foreseeable that:

"(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

"(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

"(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more."

You should consult Regulation 18705.1(c) to ensure that you identify the materiality threshold actually appropriate to your rental business.

### Foreseeability

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) However, an effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra.*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Accordingly, the Commission cannot determine the reasonably foreseeable financial effects of decisions regarding the WBUV, including any improvements to Broadway Avenue, and decisions specific to the proposed library. Because the Commission is not a finder of fact, the determination of whether a decision will have a reasonably foreseeable material financial effect on your rental business must be left up to your informed judgment.

Nonetheless, the facts you have provided do indicate some reasonably foreseeable material financial effect on your economic interest in your residential rental property. As previously addressed, any financial effect on your economic interest in your rental property is presumed to be material because the properties are directly involved in decisions regarding the WBUV, including any improvements to Broadway Avenue, and decisions specific to the proposed library. Accordingly, you may not make, participate in making, or influence any of these decisions unless you can rebut the presumption of materiality by showing that it is not reasonably foreseeable a particular decision will have *any* financial effect on your real property. (See Regulation 18705.2(a)(1).)<sup>8</sup>

### **Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?**

#### **Public Generally**

In our telephone conversation on January 19, 2012, you specifically asked for guidance regarding the exception to the Act’s conflict-of-interest provisions for decisions that affect the

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<sup>8</sup> Note that even if you can rebut the presumption of materiality, you may not make, participate in making, or influence a decision regarding the WBUV, including improvements to Broadway Avenue, or a decision specific to the proposed library unless you can also determine that there will be *no* reasonably foreseeable material financial effects on any other economic interest you have including your interests in your rental business and tenants of the rental business.

“public generally.” Under this exception, an official with a disqualifying conflict of interest may take part in a governmental decision if the decision affects the public official’s economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Regulation 18707.1(a) establishes a two-pronged test to determine if the material financial effect of a governmental decision on a public official’s economic interest is indistinguishable from its effect on the public generally. Under this test, the governmental decision must affect a “significant segment” of the public generally and must financially affect the public official’s economic interest in “substantially the same manner” as it affects the significant segment identified. (Regulation 18707.1 (b)(1) and (b)(2).)

For an economic interest in real property such as your residential rental property, Regulation 18707.1(b)(1)(B) provides that a governmental decision will affect a “significant segment” of the public generally if the decision also affects ten percent or more of all property owners or all homeowners in the jurisdiction of the official’s agency or the district the official represents, or 5,000 property owners or homeowners in the jurisdiction of the official’s agency. For an decision that affects a business entity in which the official has an economic interests, such as your economic interests in your rental business as a business entity and source of income, Regulation 18707.1(b)(1)(C) provides that a governmental decision will affect a “significant segment” of the public generally if “the decision also affects either 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents.

The second prong of the public generally test requires that the decision affect the public official’s economic interest in “substantially the same manner” as the significant segment identified. For economic interest in real property, Regulation 18707.1(b)(2)(A) provides a non-exclusive list of factors that must be taken into consideration when determining whether the “significant segment” identified will be affected in “substantially the same manner.” Factors most relevant to the facts you have provided include the following:

- The magnitude of the financial effect of the governmental decision on the official’s property as compared with other properties contained within the significant segment;
- The proximity of the official’s property to the property that is the subject of the governmental decision compared with the proximity of other properties contained within the significant segment;
- The physical characteristics or permitted use of the property (i.e., historical, commercial, residential) as compared to other properties in the significant segment;
- Improvements made to the official’s property as compared with other properties contained within the significant segment;

- The character of the effects on the neighborhood of the property in which the official has an economic interest including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood compared with the neighborhoods of other properties contained within the significant segment.

Based upon the facts you have provided, and setting aside your potential economic interests in tenants of your rental property for purposes of this analysis, you have not provided sufficient information for us to determine whether your economic interests in your residential rental property or your rental business will be effected in “substantially the same manner” as the minimum number of properties or business specified by Regulation 18707.1(b)(1)(B) or (b)(1)(C). However, you have stated that your property is a residential rental unit in a largely commercial neighborhood. Accordingly, based solely on your economic interest in your residential rental property, it does not appear that the public generally exception applies to your particular circumstances because it is unlikely that your rental property would be affected in “substantially the same manner” as the commercial properties within the neighborhood.

### **Legally Required Participation**

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be paralyzed from acting. (Section 87101; Regulation 18708.) However, you have not presented any facts indicating that the “legally required participation” exception is applicable to your circumstances, so we will not address it further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel



By: Brian G. Lau  
Counsel, Legal Division

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